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**'ECJ 26 October 2006, Case C-168-05 Mostaza Claro v. Centro Movil Milenium SL - The Unfair Contract Terms Directive: The ECJ's Third Intervention in Domestic Procedural Law'**  
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*Published in:*  
European Review of Private Law

**IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.**

*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2007

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Pavillon, C. M. D. S. (2007). 'ECJ 26 October 2006, Case C-168-05 Mostaza Claro v. Centro Movil Milenium SL - The Unfair Contract Terms Directive: The ECJ's Third Intervention in Domestic Procedural Law'. *European Review of Private Law*, nr. 5, 735 - 748.

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## **ECJ 26 October 2006, Case C-168-05 *Mostaza Claro v. Centro Móvil Milenium SL* – The Unfair Contract Terms Directive: The ECJ's Third Intervention in Domestic Procedural Law**

**Keywords:** Unfair Contract Terms, consumer protection, procedural autonomy, Community public policy, arbitration clause, *ex officio*.

**Abstract:** Directive 93/13/EEC requires any court which hears an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term to the consumer's detriment, where this issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings. This ruling is based on an analogy with the *Eco Swiss* judgment and on the public interest of the protecting the consumer, in view of the *risk* that of the latter being is unaware of his rights or of encountering difficulties in enforcing them. These grounds as well as the questionable finding that the Directive amounts to Community public policy, are subjected to critical review in this paper, following the *Cofidis* case – the latter being the second occasion on which a national procedural rule had to yield to the principle of effectiveness. The most striking feature of this judgment is the contrast between the Court's far-reaching intervention in the domestic procedural legal order, at the expense of the principle of procedural autonomy on the one hand, and its will to leave the assessment of what constitutes an unfair term to the discretion of the national courts on the other. If the Court has its way, the harmonisation of the protection against unfair contract terms will be procedural rather than substantive by nature.

**Résumé:** La directive 93/13/CEE implique qu'une juridiction nationale saisie d'un recours en annulation d'une sentence arbitrale apprécie la nullité de la convention d'arbitrage et annule cette sentence au motif que ladite convention contient une clause abusive, alors même que le consommateur a invoqué cette nullité non pas dans le cadre de la procédure arbitrale, mais uniquement dans celui du recours en annulation. Cette décision est fondée sur une analogie avec l'arrêt *Eco Swiss* et sur l'intérêt public de la protection du consommateur, eu égard au *risque* que celui-ci soit dans l'ignorance de ses droits ou rencontre des difficultés pour les exercer. Ces fondements ainsi que la reconnaissance douteuse du caractère d'ordre public communautaire de la directive sont soumis à une évaluation critique. Après l'affaire *Cofidis*, la Cour fait une seconde fois plier une règle de procédure nationale devant l'effet utile de la directive. L'aspect le plus frappant de cet arrêt est le contraste entre l'immixtion dans l'ordre procédural interne, au prix du principe de l'autonomie procédurale, et sa volonté de laisser la définition de ce qui constitue une clause abusive à la discrétion du juge national. S'il en tient à la Cour, l'harmonisation de la protection contre les clauses abusives sera celle des procédures nationales plutôt qu'une harmonisation sur le plan du contenu de la directive.

**Zusammenfassung:** Richtlinie 93/13/EWG impliziert, daß ein nationales Gericht, das über eine Klage auf Aufhebung eines Schiedsspruchs zu entscheiden hat, die Nichtigkeit der Schiedsvereinbarung prüft und den Schiedsspruch aufhebt, wenn die Schiedsvereinbarung eine missbräuchliche Klausel zu Lasten des Verbrauchers enthält, auch wenn der Verbraucher diese Nichtigkeit nicht im Schiedsverfahren, sondern erst im Verfahren der Aufhebungsklage eingewandt hat. Dieses Urteil stützt sich auf eine Analogie mit der *Eco Swiss* Entscheidung und auf das öffentliche Interesse am Verbraucherschutz angesichts der *Gefahr*, daß der Verbraucher seine Rechte nicht kennt oder Schwierigkeiten hat, sie auszuüben. Diese Gründe und die anfechtbare Folgerung, daß die Richtlinie Teil der

gemeinschaftlichen öffentlichen Ordnung ist, werden kritisch besprochen. Nach dem *Cofidis* Fall, ordnet der Gerichtshof zum zweiten Mal eine nationale Verfahrensvorschrift dem Effektivitätsprinzip unter. Das Auffallendste an diesem Urteil ist der Kontrast zwischen der weitreichenden Einmischung in die nationale Verfahrensordnung auf Kosten der nationalen Verfahrenautonomie und der Wille, die Definition einer mißbräuchlichen Klausel dem nationalen Richter zu überlassen. Wenn es nach dem Europäischen Gerichtshof geht, betrifft die Harmonisierung des Schutzes vor mißbräuchlichen Klauseln eher den Verfahrensverlauf als den Inhalt der Richtlinie.

## *Dutch case note*

CHARLOTTE M.D.S. PAVILLON\*

### **1. The Facts<sup>1</sup>**

In May 2002 a contract was concluded between a consumer, Ms Mostaza Claro (claimant) and a mobile telephone operator Móvil (defendant). This contract contained an arbitration clause for the resolution of disputes. The European Association of Arbitration in Law and in Equity (AEADE) was to be addressed for the arbitration of any disputes arising from the contract. Ms Mostaza Claro did not observe the minimum subscription period, and as a consequence Móvil brought arbitration proceedings before the AEADE. Ms Mostaza Claro was granted a period of ten days in which to refuse arbitration proceedings but did not avail herself of this offer. She chose instead to present arguments on the merits of the dispute. The arbitral tribunal found against her. Ms Mostaza Claro then applied to the referring court, contesting the arbitration decision and claiming that the arbitration agreement was null and void because of the unfair nature of the arbitration clause. The *Audiencia Provincial de Madrid* confirmed the unfair nature of this clause. However, under Spanish procedural law Ms Mostaza Claro should have pleaded that the agreement was invalid *during* the arbitration proceedings. Seeking to interpret national law in conformity with the Unfair Contract Terms Directive,<sup>2</sup> the Spanish court requested the European Court of Justice (ECJ) for a preliminary ruling under Article 234 EC, referring the following question:

May the protection of consumers under Council Directive 93/13/EEC require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?

### **2. A Critical Review of the ECJ's Reasoning in this Decision**

The ECJ answered the referred question affirmatively. This reply owes a great deal to the application of syllogistic reasoning, since the ECJ draws its conclusion from two

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<sup>1</sup> ECJ 26 October 2006, Case C-168-05 *Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421.

<sup>2</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29) hereinafter referred to as the Directive, as Directive 93/13, or as the Unfair Contract Terms Directive.

premises. The first premise or statement would be the ruling in the *Eco Swiss* judgment.<sup>3</sup> The second premise is the (implicit) statement that the Directive contains such mandatory Community rules of public policy because of 'the nature and importance of the public interest underlying the protection which the Directive confers on consumers'.<sup>4</sup>

## 2.1 First Premise: The Analogy with the *Eco Swiss* Ruling

The preliminary question in *Mostaza Claro* resembles that which led to the *Eco Swiss* ruling. In both cases, a national court hearing an action for annulment of an arbitration award inquired whether it should annul the award if, in its view, it violated Community law. Whereas in the *Eco Swiss* case the arbitration award failed to comply with mandatory provisions of EC competition law, in *Mostaza Claro* the arbitration procedure was based on an unfair contract term within the meaning of Directive 93/13. In *Eco Swiss* the ECJ ruled that,

where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules *of this type* [author's emphasis].<sup>5</sup>

Mandatory provisions of EC competition law were, from that point onwards, to be considered as Community rules of public policy *in the legal context* of the review and annulment of arbitration awards. At the same time, the ECJ set a precedent, in that henceforth the abovementioned ruling should also apply in full to any arbitration awards based on an unfair arbitration clause (i.e. agreement). The provisions of the Directive (on which the protection system is based) were to be regarded as rules of Community public policy.<sup>6</sup>

This reasoning by analogy presents two flaws.<sup>7</sup> The first lies in the omission of what, in my opinion, constitutes the most valid argument put forward in the *Eco*

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<sup>3</sup> ECJ 1 June 1999, Case C-126/97 *Eco Swiss* [1999] ECR I-3055.

<sup>4</sup> ECJ C-168/05, para. 38.

<sup>5</sup> ECJ C-168/05, para. 35.

<sup>6</sup> ECJ C-168/05, para. 35.

<sup>7</sup> Yet, the ECJ was right to leave out the nullity sanction argument underpinning the public policy nature of Art. 81 EC in the *Eco Swiss* ruling. Art. 6 (1) of Directive 93/13 cannot be confirmed to be equipped with this sanction. This article is to be read as a mere reference to national law. Otherwise, this omission would have been justified as the nullity sanction constitutes a poor argument in favour of the fundamental nature of a rule of EC law: S. PRECHAL and N. SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From *Van Schijndel* to *Eco Swiss* and beyond', *ERPL (European Review of Private Law)* 5-2004, p. 589, at pp 605-606: 'Does (the unique express nullity sanction attached to Art. 81) imply that other rules lacking such a sanction will not qualify as fundamental ( . . . )? The criterion of nullity used by the ECJ shed little light on the differentiation of rules within EC competition law'.

*Swiss* judgment. The ECJ ignored the valid proposition that arbitrators should not be allowed to make preliminary referrals to the ECJ, since this could adversely affect the uniform interpretation of Community provisions. The argument that European rules and their underlying values may not be subverted in arbitration proceedings could have strengthened the analogy and provided more solid grounds for the conclusion that national arbitration law had to take second place.

The second flaw resides in the intrinsic weakness of the only argument that was actually derived from the *Eco Swiss* case, i.e. that the public policy nature of the directive could be based on Article 3 EC Treaty. Directive 93/13 'is, according to Article 3(1)(t) EC, a measure which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market'.<sup>8</sup> This basis for attributing public policy status to Community rules has already been called into question with respect to the *Eco Swiss* judgment.<sup>9</sup> How persuasive is the argument that rules adopted for *one type* of the activities of the Community listed in Article 3 should be awarded public status? All EC consumer law directives on consumer law could, by that token, potentially be regarded as rules of economic public policy. This lack of clarity is unfortunate not only in view of the different ways in which the public policy nature of a rule can be conceived in various domestic and international contexts, but also because of the unidentifiable and eclectic status of Community public policy, which is concerned either with meta-economic policy or with economic policy in a general sense.<sup>10</sup> The boundaries of what constitutes Community economic public policy remain largely undefined. More certainty is needed as public policy in a national context is often at odds with its counterpart at the Community level. On the one hand, public policy exceptions which are based on the protection of national interests and concerns may constitute an obstacle to achieving the fundamental economic objectives of the Community. On the other hand, Community economic public policy can be regarded as a threat to fundamental national values.<sup>11</sup> It could be argued that, by analogy with the *Rutili* ruling<sup>12</sup> and in view of the principle of procedural autonomy, the way in which the ECJ interprets the notion of Community economic public policy should be a restrictive one.

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<sup>8</sup> ECJ C-168/05, para. 37.

<sup>9</sup> S. PRECHAL and N. SHELKOPLYAS, *op. cit.* in footnote 7, at 605.

<sup>10</sup> The first type of public policy comprises competition law and monetary stability, the second type forms a warrant for fundamental rights and safety: S. PRECHAL and N. SHELKOPLYAS, *op. cit.* in footnote 7, pp 600–602.

<sup>11</sup> F. TERRÉ, P. SIMLER and Y. LEQUETTE, *Droit civil – Les obligations*, Dalloz, Paris 2005, n° 374.

<sup>12</sup> ECJ 28 October 1975, Case C-36/75 *Rutili* [1975] ECR 1219, para. 27: '( . . . ) the concept of public policy must, in the community context and where, in particular, it is used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted strictly ( . . . )'

In this respect, the Opinion delivered by Advocate General Tizzano deserves particular attention. Mr Tizzano advocated that the public policy status of the provisions contained in this Directive provisions be substantiated in a cautious and detailed manner, based on ‘fair trial’ considerations.<sup>13</sup> He was somewhat reluctant to follow the ‘path proposed by the Commission’, i.e. that which passes through the tasks entrusted to the Community in Article 3(1)(t) EC Treaty, as he ‘fear(s) that (this view) is open to the objection that it might give excessively wide scope to (the public policy) concept’ (a highly pertinent remark that remained largely unheeded). Instead of this approach – which he nevertheless describes as being possibly ‘legitimate’ – Mr Tizzano proposes a strategy inspired by the second type of Community public policy referred to above, i.e. that which is based on fundamental rights and safety measures.<sup>14</sup> In his view, the ‘fundamental principle of the legal order, namely the right to a fair hearing’ is at the centre of this case. The prudent approach proposed by the Advocate General represents a sound and convincing alternative to the reasoning by analogy which is based on Article 3 EC.

## **2.2 Second Premise: The Public Importance of the Directive Protection System**

The ECJ devotes many paragraphs to the importance of external corrective action by national judges aimed at securing the effectiveness of the protection provided by the Directive.<sup>15</sup> In these grounds of judgment the ECJ continually refers to its earlier readings of Directive 93/13 as establishing a system of protection against the risk that a consumer could be unaware of his rights or experience difficulties in enforcing them. The imbalance between the weak consumer on the one hand and the seller or supplier on the other, in terms of both their respective bargaining power and their level of knowledge, can, according to the ECJ, only be corrected through positive action by national judges who have no connection with the actual parties to the contract. In its *Océano* ruling,<sup>16</sup> the ECJ used the penalty attached to Article 6(1) of Directive 93/13 to give the national courts the authority to determine, independently, whether or not a term is unfair. This article seeks to prevent that the consumer be bound by an unfair contract term.<sup>17</sup> The *Océano* ruling was subsequently confirmed by the *Cofidis* judgment.<sup>18</sup> According to the ECJ, the

<sup>13</sup> Opinion Advocate General Tizzano, paras 56–57. See also: N. REICH, ‘More clarity after “Claro”?’, *ECLR (European Contract Law Review)* 2007-1, p. 41, at 42–43.

<sup>14</sup> He refers to: ECJ 28 March 2000, Case C-7/98 *Krombach* [2000] ECR I-1935.

<sup>15</sup> ECJ C-168/05, paras 25 to 31 and 36 to 38.

<sup>16</sup> ECJ 27 June 2000, Joined Cases C-240/98 to C-244/98 *Océano Grupo* [2000] ECR I-4941.

<sup>17</sup> ‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

<sup>18</sup> ECJ 21 November 2002, Case C-473/00 *Cofidis* [2002] ECR I-10875.

nature and importance of the public interest upon which the protection contained in Directive 93/13 is founded is such that its provisions should be regarded as rules of European public policy.<sup>19</sup> However, the Court fails to specify why the protection provided by Directive 93/13 is significant in terms of economic public policy. Accordingly, as has been mentioned before, its conclusion is lacking in a sound basis.

### 3. Far-Reaching Intervention in the National Procedural Legal Order

#### 3.1 *The Respective Roles of the ECJ and National Courts Regarding Procedural Rules*

The choice of specific procedural rules seeking to safeguard individual rights derived from Community law is left to the domestic legal order of each Member State, provided that account is taken of the *Rewe* conditions.<sup>20</sup> In accordance with the principle of equivalence, national procedural rules designed to ensure the protection of the rights which individuals acquire under Community law may not be less favourable than those governing similar domestic rights. Also, in the light of the effectiveness principle, they may not make it impossible in practice, or excessively difficult, to exercise those rights which are conferred by the Community legal order. The framework within which Member States may determine the judicial and procedural rules governing the remedies for enforcing individual European rights has become settled case law.<sup>21</sup>

The requirements of effectiveness (or effective judicial protection<sup>22</sup>) and equivalence do not automatically mean that procedural provision should yield to Community law. As the ECJ stated in *Van Schijndel*:

Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic

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<sup>19</sup> It remains unclear whether the public policy nature relates to either the entire Directive or only to Art. 6 (1): the analogy with the *Eco Swiss* ruling suggests the first option, the referrals to the *Océano* ruling specifically point at Art. 6 (1) of the Directive.

<sup>20</sup> ECJ 16 December 1976, Case C-33/76 *Rewe* [1976] ECR 1989.

<sup>21</sup> ECJ 16 May 2000, Case C-78/98 *Preston and Others* [2000] ECR I-3201, para. 31; 19 September 2006, Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, para. 57; 15 March 2007, Case C-35/05 *Reemtsma Cigarettenfabriken GmbH v. Ministero delle Finanze* [2007] n.y.r., para. 40.

<sup>22</sup> The expanded version of the principle of effectiveness was developed for the first time in ECJ 15 May 1986, Case 222/84 *Johnston* [1986] ECR 1651. See S. PRECHAL and N. SHELKOPLYAS, *op. cit.* in footnote 7, p. 591.



judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.<sup>23</sup>

This analysis of the domestic situation on a case by case basis provides a justification for the procedural autonomy of the Member States as it prevents the unimpeded application of Community law. As such it is tantamount to a procedural *rule of reason*.<sup>24</sup> The ECJ must give due attention to the entire factual and legal context of each case. In the *Van Schijndel* ruling, this ‘custom-made’ analysis made it possible to give precedence to the Dutch principle of judicial passivity, which was ultimately justified by the *rule of reason*:

That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.<sup>25</sup>

### **3.2 The Procedural Rule of Reason (Twice) and the Unfair Contract Terms Directive**

The *Mostaza Claro* ruling is characterized by far-reaching intervention in the national procedural legal order on the part of the ECJ. In the field of administrative law, such intervention in the national procedural in the name of the principle of effectiveness is a not uncommon occurrence. However in the field of consumer law, national procedural autonomy has been tampered with less frequently. Directive 93/13 constitutes an exception: the principle of effectiveness had already been applied twice (three times if we take the *Océano* ruling into account)<sup>26</sup> and in both the *Cofidis* and *Mostaza Claro* cases national procedural law had to make way for the effective application of the Directive. In *Cofidis* effective judicial protection, as inferred from the Directive, precluded the application of a national provision which prevented the national court from finding a term unfair (either *ex officio* or following a plea raised by the consumer) after the expiry of a limitation period. What

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<sup>23</sup> ECJ 14 December 1995, Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705, para. 19.

<sup>24</sup> J.W. RUTGERS, ‘Ambtshalve toepassing van Europees recht in het civiele geding’, in: R.J.C. Flach *et al.* (eds), *Rutgers-bundel*, Kluwer, Deventer 2005, p. 295–303, at pp 296–297, with reference to ECJ C-430/93 and C-431/93, para. 19 and ECJ 14 December 1995, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 14.

<sup>25</sup> ECJ C-430/93 and C-431/93, para. 21.

<sup>26</sup> In all three cases the ECJ reached a result with considerable implications for national civil procedural law by interpreting the Directive in the light of the expanded version of the principle of effectiveness, i.e. the principle of effective judicial protection. However, unlike the *Cofidis* and *Mostaza Claro* judgments, the *Océano* ruling did not *subject* a conflicting national procedural rule to this principle.

does the application of the *rule of reason* test tell us about the motives for these two intrusions into national procedures?

In its *Cofidis* ruling, the Court at least expressively noted the requirement that an assessment be made ‘on a case by case basis’.<sup>27</sup> Yet, both the *Cofidis* and the *Mostaza Claro* ruling barely take account of the ‘case’s own factual and legal context as a whole’, passing over the procedural *rule of reason*.<sup>28</sup> In *Mostaza Claro*, the actual interest inherent in efficient arbitration proceedings was not properly taken into consideration.<sup>29</sup> From this point of view, the fact that the old Spanish procedural rule was overridden is questionable. The fact that Spanish procedural law ‘no longer requires an objection to the arbitration, in particular on the grounds of the invalidity of the arbitration agreement, to be raised at the same time as the parties make their original claims’ might have removed the need for a procedural *rule of reason* test.<sup>30</sup> The Court’s ruling in both cases is based exclusively on an extraordinary – or even excessive – emphasis placed on protecting the weaker party.<sup>31</sup>

In *Mostaza Claro*, however, the ECJ seems to make some kind of reservation, as it did in *Eco Swiss* earlier. In the knowledge that national judges are merely required to interpret national law in conformity with the Directive *as far as possible*,<sup>32</sup> the ECJ actually takes account of the restrictions imposed by national law. A national court must grant an application for annulment based on a failure to comply with Community rules of public policy ‘where ( . . . ) domestic rules of procedure require (it) to grant an application for annulment ( . . . ) founded on failure to observe national rules of public policy’ [author’s emphasis].<sup>33</sup> Does this mean the continued application of a national rule which requires an objection to the arbitration, in particular on one which is based on the invalidity of the arbitration agreement, to be raised at the same time as the parties make their original claims? Whereas such a rule no longer exists in Spanish law,<sup>34</sup> it remains applicable in countries such as the Netherlands (Article 1052(2) in conjunction with Article 1065(2) Dutch Code of Civil Procedure). Dutch rules of procedure do not allow a court to grant an application for annulment of an arbitration award when the arbitration clause constitutes an unfair term and its nullity was not raised in time. If he found himself in Ms Mostaza Claro’s situation, a Dutch consumer would not enjoy the same level of protection.

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<sup>27</sup> ECJ C-473/00, para. 37.

<sup>28</sup> After *Cofidis* the lack of consideration for the national rule was severely criticised: C. NOURISSAT, ‘Droit communautaire et forclusion biennale: l’étrange effet utile de l’esprit de la directive “clauses abusives”!’, *Dalloz* 2003, pp 486–490.

<sup>29</sup> ECJ C-168/05, paras. 33–34.

<sup>30</sup> ECJ C-168/05, paras. 32.

<sup>31</sup> See the *Océano* ruling but also ECJ 9 November 2000, Case C-381/98 *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.* [2000] ECR I-9305; J.W. RUTGERS, *op. cit.* in footnote 24, p. 299.

<sup>32</sup> ECJ 13 November 1990, Case C-106/89 *Marleasing* [1990] ECR I-4135.

<sup>33</sup> ECJ C-168/05, para. 35.

<sup>34</sup> ECJ C-168/05, para. 32.

The concerns about the possible constraints exercised at national level make little sense in the light of the ‘categorical imperative’ relating to protection which was advanced in the ECJ’s decisions on Directive 93/13. The principle of (judicial) effectiveness would probably obstruct many of those constraints.

#### 4. Directive 93/13 Equating Community Public Policy?

##### 4.1 Public Policy Nature: For What Purposes?

Like *Eco Swiss*, the *Mostaza Claro* judgment illustrates the application of the *Rewe* principles governing the relationships between EC law and the national procedural environment in the context of arbitration. Whilst at first glance the result of the application of those principles in *Mostaza Claro* occurs within the same limited context, the actual implications of this application might reach a little further. There are several indications that the protection organised by the Directive constitutes an element of Community public policy for a broader purpose than the annulment of arbitral awards. The repeated referrals to the *Océano* and *Cofidis* judgments raise the question whether the public policy status of the Unfair Contract Terms Directive can be ‘generalized and extrapolated’ to cover the area of the *ex officio* application of the Directive.<sup>35</sup>

For a start, the application of the *Rewe* principles within the framework of Directive 93/13 already concerns the *ex officio* application of the Directive (e.g. in *Cofidis*). Even though the ECJ never mentioned the public policy nature of the Directive in relation to the special powers conferred upon the national court aimed at achieving the goals set by Articles 6 and 7, Advocate General Saggio did describe the provisions of the Directive as ‘“mandatory” rules of “economic public policy”’ in his Opinion on the *Océano* case.<sup>36</sup>

Second, a shift can be detected with regard to the compulsory nature of the *unfairness* test. From the *Mostaza Claro* ruling there clearly emerges a duty to decide *ex officio* on the unfairness of a contract term, thus closing the debate on the question whether courts have a mere power or a full duty to assess this unfairness of its own motion. In comparison to the *Océano* ruling, *Mostaza Claro* noticeably tightened the judicial assignment under Article 6 of the Directive. From the national court ‘*being able*’ to determine of its own motion whether a term of a contract before it is unfair,<sup>37</sup> it is according to the *Mostaza Claro* ruling ‘*being required*’ to evaluate of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier’ [author’s emphasis].<sup>38</sup> Not only

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<sup>35</sup> S. PRECHAL and N. SHELKOPLYAS, *op. cit.* in footnote 7, p. 599. The preliminary question of the Spanish court does not touch the issue of the *ex officio* application of the Directive as Ms Mostaza Claro actually pleaded that the term was unfair in the action for annulment.

<sup>36</sup> Opinion of Advocate General Tizzano in *Océano*, para. 25.

<sup>37</sup> ECJ C-240/98, para. 29.

<sup>38</sup> ECJ C-168/05, para. 38.

do the national courts need to have the power to assess the unfairness of a term of their own motion; they are actually obliged to make use of their powers.

Third, the arguments underlying the public interest of the protection benefiting the *potentially* weak consumer, i.e. a system that aims at compensating the *risk* that a consumer is unaware of his rights or experiences difficulties in enforcing them, are formulated in such abstract and general terms that the extrapolation of the public policy nature of this system might be justified. It looks as if the ECJ is introducing an abstract image of the consumer in the field of *unfair* contract terms as it had previously done in the area of *misleading* advertising.<sup>39</sup> Each time a consumer *might be* unaware of his rights or experiencing difficulties in enforcing them, the Directive would amount to public policy.

#### 4.2 Putting the Public Policy Nature of Directive 93/13 Into Perspective

Even though the Dutch *unfairness* test does not constitute public policy, the Dutch courts should apply Community public policy rules as they do national public policy rules.<sup>40</sup> Regarding the *unfairness* test, a problem arises. The Community public policy rule in question is not directly applicable and the consistent interpretation technique has its limits:<sup>41</sup> the sanction for failing the test under Dutch law, the *avoidability* of the term, is not designed to be applied by a judge of its own motion and needs to be raised by the parties.<sup>42</sup> That being said, there is great similarity between the duty to consider *ex officio* the unfairness of a contract term imposed by the ECJ and the obligation of a national court under Dutch procedural law to add of its own motion legal grounds not put forward by parties (Article 25 Dutch Code of Civil Procedure). With regard to non-public policy rules, this obligation only applies as long as the limits of the dispute are taken into consideration. This means the court cannot rely on facts and circumstances other than those advanced by parties (Article 24 Dutch Code of Civil Procedure). This passive role of the judge, left unaffected in the *Van Schijndel* ruling,<sup>43</sup> is however to

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<sup>39</sup> The ECJ's typical consumer in the field of *unfair* contract terms seemingly diverges from the 'reasonably well informed and reasonably observant and circumspect' consumer who serves as reference in the free movement-case law. See e.g. ECJ 16 July 1998, Case C-210/96 *Gut Springenheide* [1998] ECR I-4657.

<sup>40</sup> J.W. RUTGERS, *op. cit.* in footnote 24, p. 302.

<sup>41</sup> ECJ C-106/89.

<sup>42</sup> The inadequacy of the current provision asks for its amendment: C.E. DRION, 'Een pamflet voor het fundamenteel op de schop nemen van onze regelgeving over algemene voorwaarden', *Contracteren* 2007/1, p. 2, at 3.

<sup>43</sup> ECJ C-430/93 and C-431/93, para. 22. After applying the procedural *rule of reason* test, the Court decided that 'Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim'.

become more active when the rule appearing in the case before him is of public policy. In that case the judge would be less bound by the limits of the dispute: the facts and circumstances advanced by the parties would not be the only basis on which the judge can decide of the unfairness of the term. The judge could for example rely to a larger extent on information contained in the case files to assess the unfairness of the term of its own initiative.

After the *Eco Swiss* ruling there was little ambiguity about the fact the ruling had no implications for the Dutch principle of judicial passivity: there was no duty to consider an infringement of competition law *ex officio*. Even after *Océano*, the ruling in *Van Schijndel* still drew the limits of the Dutch judicial activism with regard to EC-law. The combined public policy character of the provisions of the Directive and duty of the national judge to consider unfairness of its own motion might imply that we cannot longer take *Van Schijndel* and other rulings where the procedural *rule of reason* prevailed for granted when it comes to the field of unfair contract terms. If the public policy nature of the Directive indeed is broader than that of Article 81 EC in *Eco Swiss*, the ECJ opened a way to bypass the *Van Schijndel* judgment in the field of unfair contract terms. Yet, this conclusion needs to be put into perspective: the additional information to the service of the judge will most of the time not be sufficient to draw final conclusions and supplementing the legal grounds with a public policy rule will often require the cooperation of the parties.<sup>44</sup>

## 5. A 'Procedural' Rather Than Substantive Harmonisation

The ECJ has a clear vision of how it wishes to contribute to the harmonisation of the protection against unfair contract terms. On the one hand, if procedural rules form the slightest hindrance to the effective working of the Directive – and this seems to be easily the case – it will attach little value to the procedural autonomy of Member States. On the other hand it leaves the application of the substantive *unfairness* test at the discretion of the national courts. The *Mostaza Claro* judgment confirms this contrasted approach to harmonisation. First, the precedence offered once again to the protection of the potentially weak, 'ignorant' and/or 'impecunious' consumer stresses the growing importance of this idea at the expense of the procedural *rule of reason*. Second, although the preliminary question does not deal with the *unfairness* test as such, the ECJ finds the opportunity to endorse the recent *Hofstetter* ruling, in which it defined the limits of its interpretative competences regarding the substance of the *unfairness* clause.<sup>45</sup>

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<sup>44</sup> H.B. KRANS, H.H.B. VEDDER and M.H. WISSINK, 'Ambtshalve toetsing van overeenkomsten aan het kartelverbod', *VrA (Vermogensrechtelijke Annotaties)* 2005/1, p. 5, at 22-27.

<sup>45</sup> A possible reason why the ECJ goes into this competence question is because the parties which submitted written observations did spend a significant amount of time considering the question whether the arbitration clause at issue in the main proceedings really constituted an unfair term. See the Opinion of Advocate General Tizzano in *Océano*, para. 23.

The ECJ appears to have been correct in setting those limits, since it is only entitled to interpret the content of an EC provision and may not apply its interpretation to the facts of the case. Yet it is difficult to make a rigorous distinction between application and interpretation. With regard to the *unfairness* test (Article 3 of the Directive), the ECJ has struggled with this distinction. In the *Océano* case, the ECJ practically declared a jurisdiction clause unfair as it ‘was solely to the benefit of the trader and contained no benefit in return for the consumer’. Even though the circumstances were allegedly obvious, the ECJ *took them into account* and applied the test. In the *Hofstetter* case, however, the ECJ considered the circumstances were less evident than in *Océano* and left the application of the test to the national court. The question is not so much what ‘evident circumstances’ actually amount to but whether the ECJ has distanced itself from its active *Océano* approach (and ever will consider circumstances as plain again). *Mostaza Claro* indicates this is the case: in its ruling the ECJ reiterated it was not allowed to rule on the *application* of the general criteria laid down in Directive 93/13 to a particular term.

This however should not mean that there will be no common interpretation of the *unfairness* test.<sup>46</sup> Interpreting a general clause without applying it to the concrete circumstances is possible. The ECJ could construe the content of the minimum *unfairness* clause in terms of perspectives, standards and criteria national law should at least include, without delving into the facts – a task the ECJ is aware of but seemingly could not fulfil in *Hofstetter*.<sup>47</sup> Even if there is a strong case for the focus on procedural law ‘as it may undermine protection intended by substantive law’,<sup>48</sup> there are still many questions that need be answered with regard to the interpretation of the Article 3 Directive *good faith* and *significant imbalance* concepts (and their internal relationship). Answers *could* be given provided questions are formulated in a more abstract way and the ECJ holds less restrictive views on its interpretative task.<sup>49</sup> Its reticence strikingly contrast with the active interpretative role the ECJ traditionally ascribed itself in shaping the internal market.<sup>50</sup> Because of its significance for the free movement provisions, the open-textured *misleading* clause<sup>51</sup> has often been given a

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<sup>46</sup> Divergent opinions on the procedural or substantive nature of the *good faith* concept prove the need for such an interpretation.

<sup>47</sup> Case C-237/02 *Hofstetter* [2004] ECR I-3403, para. 22.

<sup>48</sup> See, in relation to the effect of the concept of burden of proof on the *unfairness* test: F. BRUDER, ‘Burden of Proof and the Unfair Terms in Consumer Contracts Directive’, *ERPL* 2007/2, pp 205–231.

<sup>49</sup> E.g. G. ALPA, ‘A Glance at Unfair Terms in Italy and the United Kingdom (What an Italian Lawyer can Learn from the English Experience)’, *EBLR (European Business Law Review)* 2004, p. 1123, at 1128–1129, or H.-W. MICKLITZ, ‘House of Lords – *Fair Trading v. National Bank*’ (Case Note), *ERCL* 2006/4, p. 471, at 479–480.

<sup>50</sup> Directive 93/13 is based on Art. 95 EC and ‘ha(s) as (its) object the establishment and functioning of the internal market’.

<sup>51</sup> Notably as referred to in Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250/17).

European interpretation.<sup>52</sup> In this respect, the ECJ's restrictive views on its interpretative role as regards Directive 93/13 might unveil its opinion on the internal market aim of the Directive<sup>53</sup> and maybe even on the feasibility of substantive contract law harmonisation. That's for the future to show.

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<sup>52</sup> Case C-362/88, *GB-INNO-BM* [1990] ECR I-667; Case C-238/89, *Pall* [1990] ECR I-4827; Case C-126/91, *Yves Rocher* [1993] ECR I-2361; Case C-456/93, *Langguth* [1995] ECR I-1737; and Case C-470/93, *Mars* [1995] ECR I-1923. This interpretation was regularly applied to the facts at hand. By doing so, the ECJ itself contributed to blur the distinction between application and interpretation: P. CRAIG and G. DE BÜRCA, *EU Law: Texts, Cases and Materials*, Oxford University Press 2003, pp 472–473.

<sup>53</sup> P. NEBBIA, *Unfair Contract Terms in European Law – A Study in Comparative and EC Law*, Hart Publishing 2007, p. 171.